Office-Supreme Court, U.S.
FILED
FEB 3 1983
ALEXANDER L. STEVAS,
CLERK

82-1300
No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA STATE BAR, et al.,
Petitioners,

v.

CONSUMERS UNION
OF UNITED STATES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. PATTERSON, JR.*
ANNE MARIE WHITTEMORE
DAVID C. BANKER
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131
Attorneys for Petitioners

**Counsel of Record*

QUESTION PRESENTED

Did a panel of the court of appeals by a two to one decision properly reverse as an abuse of discretion the unanimous ruling of a three-judge district court that twice found that the conscientious efforts of the Virginia State Bar in recommending promulgation and enforcement of attorney advertising rules in response to new constitutional standards being developed by this Court were special circumstances that render unjust an award of attorney's fees against the Bar?

LIST OF PARTIES

Parties to the proceedings in the United States Court of Appeals for the Fourth Circuit in Appeal No. 81-1156 were: Consumers Union of United States, Inc. and Virginia Citizens Consumer Council ("Consumers Union"), appellants, and the Virginia State Bar, James C. Roberts, in his capacity as President of the Virginia State Bar, and Alex T. Mayo, Jr., in his capacity as Chairman of the Legal Ethics Committee of the Virginia State Bar ("Bar"), appellees. The office of President of the Virginia State Bar is now held by Waller H. Horsley. The Chairman of the Legal Ethics Committee is Phillip C. Stone.

The appeal was consolidated with Appeal No. 81-1155(L) in which the parties were: Consumers Union of United States, Inc. and Virginia Citizens Consumer Council, appellees, and the Supreme Court of Virginia and Honorable Lawrence I'Anson, individually and in his capacity as Chief Justice of the Supreme Court of Virginia ("Virginia Supreme Court"), appellants.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	11
APPENDIX	A-1
Opinion and Judgment of the Court of Appeals for the Fourth Circuit, August 9, 1982	A-1
Order of the Court of Appeals for the Fourth Circuit, Denying Petitioners' Motions for Rehearing and Suggestions for Rehearing in Banc, December 28, 1962	A-15
Opinion and Judgment of the District Court for the Eastern District of Virginia, May 8, 1979	A-17
Opinion and Order of the Supreme Court of the United States, June 2, 1980	A-58
Order of the Supreme Court of the United States, June 9, 1980	A-79
Opinion and Judgment of the District Court for the Eastern District of Virginia, January 8, 1981	A-80
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988	A-99

TABLE OF AUTHORITIES

Cases

Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 4

Bigelow v. Virginia, 421 U.S. 809 (1975) 3

Bonnes v. Long, 651 F.2d 214 (4th Cir. 1981), *cert. denied*, 455 U.S. 961 (1982) 9

Bush v. Bays, 463 F. Supp. 59 (E.D. Va. 1978) 3

Consumers Union of United States, Inc. v. American Bar Association, 427 F. Supp. 506 (E.D. Va. 1976), *vacated sub nom. Consumers Union of United States, Inc. v. Virginia State Bar*, 433 U.S. 917 (1977) 4

Consumers Union of United States, Inc. v. American Bar Association, 470 F. Supp. 1055 (E.D. Va. 1979), *vacated sub nom. Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980) and *Consumers Union of United States, Inc. v. Virginia State Bar*, 447 U.S. 901 (1980) 5

Consumers Union of United States, Inc. v. American Bar Association, 505 F. Supp. 822 (E.D. Va.), *appeal dismissed sub nom. Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 451 U.S. 1012 (1981), *aff'd in part and rev'd in part sub nom. Consumers Union of United States, Inc. v. Virginia State Bar*, 688 F.2d 218 (4th Cir. 1982) 8

Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1 (1980) 10

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 10

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 3

Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977) 3

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 11

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) ... 9

Page

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) . . 7, 8
Northcross v. Board of Education of Memphis City Schools, 412 U.S. 427 (1973) 9
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 9
Price v. Pelka, 690 F.2d 98 (6th Cir. 1982) 9
Young v. Kenley, 641 F.2d 192 (4th Cir. 1981), *cert. denied*, 445 U.S. 961 (1982) 9

Statutes and Rules

28 U.S.C. § 1253 6
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343(3) (1976), *amended by* 28 U.S.C. § 1343(a)(3) (Supp. V 1981) 2
42 U.S.C. § 1983 7
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ..... 2, 7, 8, 9, 11
Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* . 10
VA. CODE § 54-48(b) (1982) 4
Fed. R. Civ. P. 54(b) 10

Miscellaneous

Disciplinary Rule 2-102(A)(6), Virginia Code of Professional Responsibility 3, 4, 5, 6
H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 3 (1976) 7
SUP. CT. R. 17(a) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. .....

VIRGINIA STATE BAR, et al.,
Petitioners,

v.

CONSUMERS UNION
OF UNITED STATES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Virginia State Bar, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on August 9, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 688 F.2d 218, is set forth beginning at page 1 of the Appendix. The order of the appeals court denying the petition for rehearing and suggestion for rehearing in banc is set forth at page 15 of the Appendix. The first opinion of the three-judge district court

on the issue of attorney's fees is reported at 470 F. Supp. 1055 and is set forth beginning at page 17 of the Appendix. The decision of this Court in *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 447 U.S. 901 (1980) is set forth beginning at page 58 of the Appendix. The order of this Court remanding this case for further consideration in light of the *Supreme Court of Virginia* case is reported at 446 U.S. 719 and is set forth at page 79 of the Appendix. The opinion of the three-judge district court on remand is reported at 505 F. Supp. 822 and is set forth beginning at page 80 of the Appendix.

JURISDICTION

The three-judge court had jurisdiction of this action by virtue of 28 U.S.C. § 1343(3) (1976), *amended by* 28 U.S.C. § 1343(a)(3) (Supp. V 1981). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on August 9, 1982. Rehearing was denied on December 28, 1982 by a two to one vote of the panel. Rehearing in banc was denied on the same date by a six to three vote of the active circuit judges. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988, respecting awards of attorney's fees in the discretion of the court, is reproduced in its entirety at page 99 of the Appendix.

STATEMENT OF THE CASE

This litigation was spawned in the era of repeated constitutional challenges to what had been time-honored and universally accepted bans on lawyer advertising. On Febru-

ary 27, 1975, Consumers Union filed this action against the Virginia Supreme Court and its Chief Justice, the Virginia State Bar and certain of its officers, and the American Bar Association ("ABA"). The Consumers Union complaint alleged that Virginia Disciplinary Rule 2-102(A)(6), which barred attorney advertising, unconstitutionally infringed Consumers Union's right to gather and publish, and its members' rights to receive information relating to legal services that it proposed to include in an attorney directory.[1]

The course of this litigation and the outcome on the merits of the challenge to the disciplinary rule were determined by decisions of this Court in other cases and by the response of the defendants to the evolving constitutional standards respecting advertising.[2]

After the filing of this suit, this Court ruled in *Bigelow v. Virginia*, 421 U.S. 809 (1975), that commercial speech is within the protection of the First Amendment. The ABA then adopted amendments to its Code of Professional Responsibility that permitted limited attorney advertising.

Following the decision in *Bigelow*, the Virginia State Bar

---

[1] Although all legal impediments to publication of the directory had been removed by the spring of 1979, the directory was not published until June 15, 1982, when, as Judge Chapman noted in his dissent to the Fourth Circuit's panel opinion, "[a]s a result of numerous questions by the Court . . . the information ha[d] been gathered. . . ." 688 F.2d at 224.

[2] Several courts have held that an award of attorney's fees is inappropriate if the plaintiff's lawsuit is not the factor that changed the unconstitutional practice. *See* Bush v. Bays, 463 F. Supp. 59, 64-67 (E.D. Va. 1978) (Decisions of other courts, not plaintiff's lawsuit, caused change in food stamp regulations); Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978) (Plaintiff must show that suit was "causally related" to change in unconstitutional practice and that plaintiff did not act gratuitously); *cf.* Naprstek v. City of Norwich, 433 F. Supp. 1369, 1370-71 (N.D.N.Y. 1977) (Plaintiff sued to invalidate antiquated and rarely-enforced juvenile curfew ordinance; court denied fee award because of absence of public benefit).

also addressed the issue of lawyer advertising. In June 1975, the Bar established a committee to study lawyer advertising and DR 2-102(A)(6), the disciplinary rule challenged in this case. The committee recommended adoption of the ABA amendments. The State Bar Council adopted the recommendations of the committee, and on April 6, 1976, the Bar petitioned the Virginia Supreme Court to amend DR 2-102(A)(6). Two weeks later, the Virginia Supreme Court overruled the Bar's recommendation and summarily denied the petition to amend the rule. It is of special significance to note that the Virginia Supreme Court has exclusive authority to promulgate disciplinary rules. VA. CODE § 54-48(b) (1982). The Bar can only recommend suggested rules and is otherwise without authority.

On December 17, 1976, the three-judge court held the disciplinary rule unconstitutional in part, but upheld that portion of the rule prohibiting publication of fees charged for services other than an initial consultation. *Consumers Union of United States, Inc. v. American Bar Association,* 427 F. Supp. 506, 523 (E.D. Va. 1976). Appeals to this Court followed.

While the appeals were pending, this Court decided *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). In *Bates,* this Court held for the first time that the advertising of fees for routine legal services is constitutionally protected. On June 29, 1977, the Supreme Court vacated the three-judge court's judgment and remanded for further consideration in light of *Bates. Consumers Union of United States, Inc. v. Virginia State Bar,* 433 U.S. 917 (1977).

Following the decision in *Bates,* the Bar promptly requested and published an opinion of the Attorney General of Virginia concerning the non-enforceability of DR 2-102(A) (6), and reached an agreement with Consumers

Union regarding certification of its proposed legal services directory. The Bar also reactivated its committee on advertising to propose amendments to the disciplinary rules that would comply with the new constitutional guidelines. Both the Bar and the Virginia Supreme Court also proposed entry of a decree in this action enjoining enforcement of DR 2-102(A)(6).

On May 8, 1979, the three-judge court ruled that the disciplinary rule was unconstitutional on its face and enjoined its enforcement. The district court, over the dissent of one judge, ordered the Virginia Supreme Court to pay Consumers Union costs and reasonable attorney's fees. The court unanimously held that special circumstances existed rendering a fee award against the Bar unjust because the Bar had petitioned the Virginia Supreme Court to amend DR 2-102(A)(6) to conform to what were then deemed to be constitutional standards. *Consumers Union of United States, Inc. v. American Bar Association,* 470 F. Supp. 1055, 1062-63 (E.D. Va. 1979).

The Virginia Supreme Court appealed to this Court, and Consumers Union cross-appealed the decision not to award attorney's fees and costs against the Bar.

On June 2, 1980, this Court vacated the fee award against the Virginia Supreme Court because the award was premised on the court's denial of the Bar's petition to amend the disciplinary rule. This Court held such action to be a legislative act for which the court enjoyed absolute immunity and which, therefore, could not be a basis for a fee award. The case was remanded to determine whether fees should be awarded against the court by reason of its role in the enforcement of disciplinary rules.

The cross-appeal regarding the three-judge court's determination not to award fees against the Bar was neither

briefed nor argued. On June 9, 1980, this Court vacated the decision not to award fees against the Bar and without opinion remanded the case for further consideration in light of the *Supreme Court of Virginia* case. *Consumers Union of United States, Inc. v. Virginia State Bar,* 447 U.S. 901 (1980).

On remand, the three-judge court awarded Consumers Union attorney's fees from the Virginia Supreme Court, over the dissent of one judge. The court again ruled unanimously that because the Bar had endeavored to have the disciplinary rule amended, special circumstances exist which would render an award of attorney's fees against the Bar unjust. Appeals to the United States Court of Appeals for the Fourth Circuit followed.[3]

On August 9, 1982, the appeals court affirmed the award of attorney's fees against the Virginia Supreme Court by a two to one decision. The majority also held that the three-judge court had abused its discretion in denying attorney's fees against the Bar. In so holding, the majority appears to have construed this Court's 1980 opinion in the *Supreme Court of Virginia* case and the remand of the Bar's case as a command to award fees.

Judge Chapman dissented from both holdings. As to the Bar, he relied upon the finding of the three-judge court that the Bar had acted in good faith as evidenced by its endeavors to have DR 2-102(A)(6) amended and that special circumstances therefore exist that render unjust a fee award against the Bar.

The Virginia Supreme Court and the Bar petitioned for a rehearing with a suggestion for rehearing in banc on

[3] The Virginia Supreme Court and Consumers Union also appealed to this Court. The Court ruled, however, that it lacked jurisdiction under 28 U.S.C. § 1253. Supreme Court of Virginia v. Consumers Union of United States, Inc., 451 U.S. 1012 (1981).

August 23, 1982. On December 28, 1982, the petition for rehearing was denied by a vote of two to one, and the suggestion for rehearing in banc was denied by a vote of six to three.

REASONS FOR GRANTING THE WRIT

Review of decisions where the appeals court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision" is one of the principal reasons for issuance of a writ of certiorari. SUP. CT. R. 17(a). The appeals court opinion in this case effectively substitutes the judgment of two circuit judges, over the dissent of a circuit judge, for the judgment of another circuit judge and two district court judges on an issue committed by statute to the discretion of the lower court. This is a situation uniquely appropriate for review by this Court in its supervisory role.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action or proceeding to enforce the provisions of 42 U.S.C. § 1983, the statute under which this action was brought, "the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added). The legislative history of the Act indicates that Congress considered and rejected mandatory awards. *See* H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 3, 8 (1976). That fees were to be allowed only in the discretion of the district court was deemed by Congress to be a "key feature" of the Act. *Id.*

The discretion accorded to a lower court in this regard had been examined by this Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In that case, this Court stated that attorney's fees should ordinarily be

awarded, but that fees should not be awarded if special circumstances render an award unjust.

The standard for review of an award or denial of attorney's fees under 42 U.S.C. § 1988 is whether the lower court abused its discretion. On remand of this case, the three-judge court re-examined the facts in light of the new analytical framework provided by this Court in *Supreme Court of Virginia v. Consumers Union of United States, Inc., supra,* applied the legal standards enunciated in *Newman v. Piggie Park Enterprises, Inc., supra,* and concluded unanimously for the second time that special circumstances exist which would render a fee award against the Bar unjust. The three-judge court based its conclusion on the Bar's unquestioned good faith endeavors to have the Disciplinary Code amended to conform to constitutional standards and not to enforce an unconstitutional rule. *Consumers Union of United States, Inc. v. American Bar Association,* 505 F. Supp. 822, 823 (E.D. Va. 1981). The record fully supports this finding.

The circuit court opinion improperly disregards this conclusion and emphasizes that the Bar recommended promulgation of the original rule. There is no evidence in the record, however, of any reason to believe that the rule was unconstitutional when originally adopted. What the two circuit judges characterize as the "tardy response" of the Bar to amend the rule is contrary to the conclusion of the three-judge court without any finding that the lower court's conclusion was clearly erroneous.

The circuit court opinion also ignores the paramount fact that the Virginia Supreme Court has exclusive authority to promulgate disciplinary rules. The circuit court's holding would suggest that the Bar, and its members, ignore duly constituted judicial authority.

Only on rare occasions since the decision in *Newman* has

this Court addressed the "special circumstances" criterion. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427 (1973). In the meantime, appellate decisions in this and other cases suggest a retreat from the abuse of discretion standard in reversing denials of attorney's fees under 42 U.S.C. § 1988. *See, e.g., Price v. Pelka*, 690 F.2d 98, 103 (6th Cir. 1982) (Merritt, J., dissenting); *cf. Bonnes v. Long*, 651 F.2d 214, 219 (4th Cir. 1981) (Murnaghan, J., dissenting), *cert. denied*, 445 U.S. 961 (1982) (Rehnquist, J., dissenting); *Young v. Kenley*, 641 F.2d 192, 194-95 (4th Cir. 1981), *cert. denied*, 445 U.S. 961 (1982) (Rehnquist, J., dissenting). Such a retreat is contrary to this Court's remand of both this case and the *Supreme Court of Virginia* case to the three-judge court for reconsideration of the fee issue. Were this not an issue committed to the lower court's discretion, a final disposition could have been made three years ago.

This Court has not hesitated to review by writ of certiorari appellate decisions that misapplied the abuse of discretion standard in reversing lower courts. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), this Court granted certiorari to the Court of Appeals for the Third Circuit to determine whether a district court had abused its discretion in applying the *forum non conveniens* doctrine to dismiss actions brought by foreign plaintiffs. Although the appeals court ostensibly held that the district court had abused its discretion in dismissing the actions, Justice Marshall explained that the appeals court had not given sufficient deference to the district court's conclusions.

> [T]he Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public

> and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

Id. at 257.

Last term the Court reviewed a decision of the Court of Appeals for the District of Columbia that held that a district court had erred in accepting the Federal Election Commission's interpretation of a provision of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq. Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981). This Court agreed with the district court's finding that the Commission's interpretation of the provision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 31. This Court set forth the appropriate standard of review:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted by a reviewing court. . . . To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. . . .

Id. at 39 (citations omitted).

Similarly, in *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 12 (1980), this Court ruled that the district court has not abused its discretion, and the appellate court is therefore not to interfere, if the district court's determination under Civil Rule 54(b) is "based on an intimate knowledge of the case and is a reasonable one." Likewise, in determining appropriate sanctions for failure to comply

with discovery orders, "[t]he question, of course, is not whether this Court, or whether the appeals court, would as an original matter have dismissed the action; it is whether the district court abused its discretion in so doing." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

These decisions illustrate that this Court has been keenly mindful that the initial and principal responsibility for the proper administration of justice in the federal courts is on the district courts, and the Court has been unwilling to permit courts of appeals to second-guess discretionary decisions. Congress has mandated this approach under 28 U.S.C. § 1988 by giving district courts discretion to determine the propriety of attorney's fee awards in individual cases.

The three-judge court properly exercised its discretion in finding that the Bar endeavored within the full range of its authority to support promulgation and enforcement of constitutional disciplinary rules and that its actions were special circumstances which would render unjust an attorney's fee award. In disturbing this finding, the court of appeals substituted its judgment and invaded the three-judge court's province as fact finder. Accordingly, this case calls for an exercise of this Court's supervisory jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. PATTERSON, JR.*
ANNE MARIE WHITTEMORE
DAVID C. BANKER
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131
Attorneys for Petitioners

**Counsel of Record*